UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

DELTA WESTERN, INC., and NORTH STAR PETROLEUM, INC., A SINGLE AND/OR JOINT EMPLOYER Employer/Respondent, and LEO ESTRADA DACIO, an Individual, Charging Party.	Case No. 19-CA-217975

RESPONDENT'S POST-HEARING BRIEF

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I. SUMMARY

This is a straight forward case. Respondent Delta Western, Inc. ("Respondent," "Employer" or "Delta Western") distributes and markets petroleum throughout Alaska. This, obviously, involves transporting hazardous materials. Delta Western, as a result, emphasizes accountability and responsibility among its employees. One of its employees, Leo Dacio tested positive for amphetamines and methamphetamines in November 2017. Dacio was then terminated as a result. He was also informed that he could reapply for an open position once he completed the DOT-mandated Substance Abuse Professionals ("SAP") Return-to-Work program. In applying for re-employment with Delta Western, however, Dacio claimed that he had been "unjustly terminated," and he inferred that the Employer had acted inappropriately when it "suddenly terminated" his employment. Dacio's application showed that he had not taken responsibility or accountability for his actions. As a result, the hiring officials for Delta Western – Liane Myers and Tim Hunter – refused to rehire Dacio because they could no longer trust him. Delta Western used its best judgment and determined that it could not place Dacio in a safety-sensitive position delivering fuel throughout the community after Dacio's response regarding his positive drug test. Dacio's prior union that occurred two years earlier was not a factor in the decision. Delta Western acted lawfully and did not violate the Act.

II. ALLEGATIONS

The General Counsel ("GC") has claimed that Dacio was discriminated against by the Respondent. (*Cf.* GC Exh. 1(G) *with* 1(N).) The GC's Complaint, and amendments thereto, do not specify a section of the Act that was allegedly violated. The GC has alleged that the Respondent failed to rehire Dacio in violation of the Act, presumably in violation of § 8(a)(3) of the Act.

III. STATEMENT OF FACTS

A. BACKGROUND FACTS.

1. Delta Western. The Employer is a fuel distributor in Alaska. (Tr. 130:14.) It has fuel distribution facilities throughout Alaska, including four fuel terminals in southeast Alaska and four fuel terminals in western Alaska.[1] (Tr. 130:17-18.) One of the fuel terminals is located in Dutch Harbor, Alaska. There are approximately fifteen employees at the Dutch Harbor facility. (Tr. 131:6-8.)

2. Driver Dock Attendant Position. The Employer distributes fuel through pipelines via different dock locations, using bulk fuel trucks, and it also has a small gas station. (Tr. 192:22-25.) The Respondent's customers include the residents of Dutch Harbor, the City, the power plant, and commercial customers (e.g. fishing vessels). (Tr. 131:16-20.) The Driver Dock Attendant is responsible for delivering the fuel. (Tr. 131:15-20.) The position is a DOT-safety sensitive position that requires a Class "B" Commercial Drivers' License ("CDL") with an "X" endorsement for hazardous materials. (Tr. 131:16-20.)

3. Accountability. The Driver Dock Attendant position is a safety-sensitive position that delivers hazardous fuels and materials. (Tr. 192:17-19.) As a result, the Employer stresses safety, reliability and accountability. (Tr. 124:17-23; Resp. Exh. 12.) These topics are discussed regularly with the employees. (Tr. 213:13-20.) Everyone that testified – including Dacio and Robin Marquez – acknowledged there were dangerous aspects of the job, and accountability was an important aspect of the job. (Tr. 84:1-9, 123:17-24.)

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[1] The court reporter mistakenly heard "field" instead of "fuel." Compare Liane Myers' testimony (Tr. pg. 130) with Tim Hunter's testimony (Tr. pgs. 192-193).

B. DELTA WESTERN'S DOT-DRUG & ALCOHOL POLICY.

4. **DOT Drug Testing Requirements**. DOT mandates that Employers with employees in DOT-positions adhere to all DOT compliance and regulatory requirements related to drug testing those employees. 49 CFR § 40.11.

5. **Delta Western's Drug & Alcohol Policy**. Delta Western has a DOT-drug testing program. (Resp. Exh. 6.) Drug testing occurs at pre-employment, random, post-accident and after reasonable suspicion. (Tr. 137:8-11.) For a random test, there is a third-party administrator, Ken George. Ken George is responsible for making the random selection, and handling the testing. (Tr. 137:12-23.) The Employer plays no role in selecting or administering the random drug test. (*Id.*)

6. **Verification Process**. As part of the random drug test, the Employer's policy requires that any positive test be verified by the Medical Review Officer ("MRO"). (Tr. 137:24-138:21.) The MRO must be a licensed physician (doctor of medicine or osteopathy). 49 CFR § 40.121(a). During the verification process, the MRO must attempt to contact the person who has tested positive prior to informing the Employer of the positive test. 49 CFR § 40.131. Delta Western and DOT-requirements mandate that the MRO verify the results with the patient to ensure that there is not a "legitimate medical explanation for [the] confirmed positive, adulterated, substituted, [or] invalid drug tests results from the laboratory." 49 CFR § 40.123. The MRO is obligated by DOT-regulations to contact the employee, if possible, prior to reporting the positive drug test to the employer. 49 CFR §§ 40.131, 40.135. This allows the tested-individual to provide any legitimate basis, such as a previously prescribed prescription medication, that may have caused the positive test. (Resp. Exh. 6; Tr. 137:24-138:21.) If the MRO is not able to reach the individual,

the MRO will contact Myers to have her assist the MRO in finding that person. (Tr. 137:24-138:21.)

7. **Prescription Drugs**. Delta Western's Drug & Alcohol policy also details limitations on the use of prescription drugs while at work. (Resp. Exh. 6, at *2.) The policy provides:

> The Company will permit the use of prescription controlled substances that are legally obtained and properly used *only* with a prescription from a licensed practitioner and *only* when such use does not violate any applicable law or impair the employee's ability to do his or her job in a safe, alert, and efficient manner.
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> Employees must have a licensed medical practitioner who is legally authorized to prescribe the medication complete a Prescription Medicine Form, and must present the completed form to Human Resources prior to reporting for duty or performing any work…
>
> A DOT-regulated employee who operates a [Commercial Motor Vehicle] shall not report for duty or remain on duty when using any Schedule I controlled substance even if the employee has a prescription.

8. **Employee Knowledge and Training**. Employees are provided copies of the Delta Western Drug & Alcohol policy upon hire. (Resp. Exhs. 2, 3.) Employees are also provided periodic reminders of the drug policy, as well as receiving training on that policy. (Resp. Exhs. 4, 5.)

C. DACIO'S TERMINATION.

9. **Dacio Employment**. Dacio was the Driver Dock Attendant night shift lead at the Dutch Harbor facility. (Tr. 150:3-8.) He worked at Delta Western from 2008 – 2017. (Tr. 31:13-17.)

10. **Random-Selection for DOT Drug Test**. On November 3, 2017, Dacio was selected randomly for a DOT-drug test. (Resp. Exh. 7.)

11. **Verification**. On November 22, 2017, Arthur Hayes, M.D., the MRO, verified the positive drug test results with Dacio.[2] (Resp. Exh. 7.)

12. **Dacio's Termination.** He was terminated on November 30, 2017 for testing positive for methamphetamines and amphetamines. (Resp. Exhs. 7, 9.)

13. **Prescription Drugs**. Dacio testified that he believed he tested positive due to a prescription drug prescribed to him from a doctor in the Philippines. (Tr. 72:5-7, 94:8-13.) He initially claimed on direct examination that the doctor prescribed him methamphetamines for a heart condition. (Tr. 71:23-24, 72:5-7.) He did not initially identify when that drug was prescribed by the doctor. He later changed his testimony, claiming that the doctor prescribed amphetamines to him to help him stay awake at work during shift changes, rather than for a heart condition. (Tr. 94:3-9; GC Exh. 9.) He also later admitted that the prescription allegedly provided to him was from 2014. (Tr. 93:22-25; GC Exh. 9.) Dacio did not report this medication to anyone at Delta Western, even though Dacio had reported a subsequent medication in May 2015, that was prescribed to him by a doctor for dental surgery. (Resp. Exh. 8.)

14. **Amphetamines versus Methamphetamines**. Dacio admitted that he tested positive for methamphetamines and amphetamines. (Tr. 71:23-24, 90:18-21; Resp. Exh. 7.) At various times during his testimony, he claimed that the Philippines doctor prescribed just

[2] Dacio claims that Dr. Hayes failed to verify the positive test results with him prior to submitting the positive test result to the Employer. (Tr. 99:16-100:3.) Such an action by Dr. Hayes would breach his DOT-obligations as an MRO and would run contrary to the past practice where an MRO will contact Liane Myers to have her assist him in finding that person, which did not occur in this instance. (49 CFR § 40.135; Tr. 137:24-138:21.) This is one example where Dacio's testimony lacks veracity. The verification is also important when considering Dacio's claim on his employment application that he was "suddenly terminated." He would not have been "suddenly terminated" because the MRO, by law, would have notified him before providing the positive test results to Delta Western. 49 CFR §§ 40.131, 40.135.

amphetamines, and at other times he claimed that both amphetamines and methamphetamines were prescribed. (*Id.*; Tr. 93:8-13.)

15. **Termination Meeting According to Dacio - Initially**. At the termination meeting, Dacio initially testified that Hunter knew that he was taking prescription medication. (Tr. 67:16-68:4) ("Oh, Tim Hunter knows that I'm taking some medications."). Dacio also initially alleged that the termination meeting was just between Dacio and Hunter. (Tr. 67:14-21) (Q: So, you went to his office. Was anyone else there? / A: Just me – just me and him [Tim Hunter]"). At the end of the meeting, Hunter told Dacio to "try and fix this as soon possible…" (Tr. 68:22.) In fact, Hunter did want Dacio to apply for the position. (Tr. 102:7-9.) Hunter described Dacio as a very friendly person that was well-liked by customers and people around him.[3] (Tr. 194:23-25.)

16. **Termination Meeting According to Dacio – Subsequent**. As with several statements from Dacio, he altered his testimony as to what transpired at the termination meeting. After initially stating that only Hunter and himself were present, he later acknowledged that Liane Myers was present at the termination meeting via phone. (*Cf.* Tr. 67:20-21 *with* Tr. 100:25-101:16.) Although he initially implied that Hunter was aware of the prescription drugs he was taking, he later acknowledged that he had not reported taking amphetamines at work to anyone. (*Cf.* Tr. 68:4, 102:20-25 *with* Tr. 95:2-6, 103:1-105:22.) Neither Hunter, nor Myers were aware Dacio was taking any prescribed medication, much less one with amphetamines (or methamphetamines). (Tr. 139:21-140:11, 175:1-10.)

[3] This is not to say that Dacio was a perfect employee. Hunter described some challenges he faced with Dacio being that Dacio did not like to bring "bad news" and would not report everything that was required of him. (Tr. 195:1-22, 197:11-20.)

D. DELTA WESTERN'S HIRING PROCEDURES.

17. **Requisition Posting**. The Employer has a systematic and uniform hiring process. When there is a job opening, the Employer will submit a requisition request on its online applicant tracking system. (Tr. 132:4-19.) As part of this requisition, a draft job description is routed to the hiring manager, supervisors, and then the President of the Employer. (*Id.*) Once the requisition is approved, the requisition is posted as active on the applicant tracking system. (*Id.*)

18. **Applicants**. Once a requisition has been created online, applicants may apply for the position online; an individual cannot apply for a position until that position is available online. (Tr. 132:4-19.) All applicants, including rehires, are required to submit an employment application to be considered for a position. (Tr. 132:4-19, 133:22-134:4, 204:16-23.) Dacio even acknowledged that an employee could only submit an application when there was a job opening posted online. (Tr. 81:13-14.)

19. **Employment Applications**. Per Employer policy and DOT-regulations, all applicants are required to submit an employment application. (Tr. 133:22-134:7.) DOT has specific requirements for all employment applications for DOT-positions. (Tr. 134:8-19.) These requirements are codified in 49 CFR 391.21 (Resp. Exh. 19) and require that any person working in a DOT-position submit an employment application with the necessary information prior to performing any DOT-required work. (Tr. 132:1-7.) As a result, the Employer, as a matter of policy, requires all applicants (new and rehires) to submit employment applications before they are considered for a DOT-position, such as the Driver Dock Attendant. (Tr. 134:5-135:136:6.)

20. **Deciding Officials**. Liane Myers,[4] Human Resources Director, and Tim Hunter, Dutch Harbor Operations Manager, were responsible for hiring the Driver Dock Attendant positions in Dutch Harbor in 2018. (Tr. 132:22-25, 204:7-15.) They were also the individuals responsible for electing whether or not to interview a specific candidate. (*Id.*)

E. DACIO ELIGIBILITY TO BE REHIRED.

21. **Substance Abuse Professional ("SAP").** DOT requires that a DOT-licensed individual must meet with an SAP prior to working on DOT-equipment after they have tested positive for an illegal substance. (Tr. 158:5-22; 49 CFR 40.287.)

22. **Dacio Eligibility for Rehire**. When Dacio was terminated on November 30, 2017, he was provided a list of SAPs. (Resp. Exh. 10.) On January 25, 2018, Kelly Wright made his final assessment on Dacio. (Resp. Exh. 38.) Wright's assessment is based in large part on Dacio's face-to-face interview with him. (GC Exh. 9.) Dacio was not eligible to apply for rehire until this process was complete. Further, as required by the Respondent's policy, Dacio was required to submit a complete employment application if he wanted to be considered for a position.

23. **Dacio Phone Solicitations**. After Dacio completed the SAP process, he contacted Tim Hunter, Liane Myers and Jim Fleming. All individuals informed Dacio that no positions were currently open, and he was welcome to apply when a position did become open. (Tr. 77:6-21, 78:3-7.) The Respondent had recently filled a Seasonal Driver Dock Attendant position prior to Dacio being eligible to apply. A seasonal employee works during the A (January through April) and B (June through September) seasons. (Tr. 165:10-13.) This seasonal position

[4] Myers has handled human resources responsibilities for Delta Western from 2001 – present. (Tr. 129:24-25, 130:21.) There was a brief hiatus in her employment when she was not with Delta Western from June 2013 – December 2013. (Tr. 130:22-131:1.) During that hiatus, the Employer relied upon a temporary human resources manager and a replacement manager. (Tr. 131:4-5.)

was opened on December 12, 2017 to replace Robin Marquez. (Tr. 164:10-15; Resp. Exh. 41.) The position was ultimately offered and accepted by Eric Moore prior to January 24, 2018.[5] (Tr. 167:9-25; Resp. Exh. 42.) Dacio was not eligible for this position while it was open – since he had not fulfilled his SAP requirement as mandated by the DOT. (Tr. 190:1-9, 200:10-12.)

F. DELTA WESTERN'S DECISION NOT TO REHIRE DACIO.

24. **Robin Marquez**. Marquez has been a Driver Dock Attendant on the night shift since 2011. (Tr. 112:13-113:6.) He was promoted to Dacio's night shift lead position on December 11, 2017. (Resp. Exh. 39; Tr. 113:11-14.) Marquez was also, similar to Dacio, involved in the union organizing campaign by the Inlandboatmen's Union ("IBU") and subsequent bargaining from 2014 through its decertification in 2016. (GC Exh. 4, 5; Tr. 50:22-25.)

25. **March 2018 Dock Attendant Positions**. On March 13, 2018, a Driver Dock Attendant position was opened. (Tr. 168:19-21.) The Respondent was hiring two Driver Dock Attendant positions to replace Art Guiang and James Sackett.[6] (Tr. 169:2-3.)

26. **Dacio Application**. Dacio applied for the position on March 15, 2018. (Resp. Exh. 11.) On his application, Dacio stated:

- **"unjust termination of employment**." (Resp. Exh. 11, at *2; Tr. 173:3-20, 174:9-22.)
- "I was still working with Delta Western up to 11/30/2017 **when I was suddenly terminated.** I went to Anchorage, Ak to have my **case cleared** and **it was cleared on 01/25/2018**." (Resp. Exh. 11, at *6.)

Those statements showed that Dacio had not accepted responsibility or accountability for his actions.

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[5] Prior to sending the January 24, 2018 offer letter, the position was verbally offered and accepted by Eric Moore. (Tr. 167:6-25.)

[6] Guiang resigned on March 9, 2018 for personal reasons. (Tr. 169:6-11.) Sacket was transferring to the Bethel facility on March 25, 2018. (Tr. 169:16-17.)

27. **Decision Not to Hire Dacio**. Hunter and Myers jointly made the decision not to rehire Dacio. (Tr. 173:6-20, 205:14-206:10.) They reviewed his application and discussed it with one another. (*Id.*) They were concerned because Dacio failed to take any responsibility or accountability for his actions. (*Id.*) The employment application, along with a conversation that Hunter had with Dacio in January after the SAP process, illustrated a concern that Dacio did not understand the seriousness of his misconduct. (Tr. 201:8-20, 205:14-206:10.) Dacio treated his failed drug test like a vacation and failed to take any accountability for his actions. (*Id.*) In March 2018, Myers and Hunter both elected not to hire Dacio based upon his failure to accept responsibility and accountability for his failed drug test as evidenced on his employment application. (Tr. 175:11-14, 186:5-11, 208:21-209:11.) Dacio's former union activities played no role in their decision not to re-hire Dacio. (Tr. 175:15-17, 209:22-24.)

28. **Driver Dock Attendant Applicants / Proper Comparators**. Respondent received approximately 54 applicants for the Driver Dock Attendant position initially posted in March 2018. (Resp. Exh. 42.) There were at least twelve applicants – similar to Dacio – that were not interviewed, even though they were generally qualified for the position. (Resp. Exh. 42 (Andrii Ivantyskyi, Damon Allen, Mario Remolino, Jeremy Robinson, Ronald Norwood, Robert Knapp, Makenna Smith, Jon Wyngaert, Eric Jones, Phillip Hodges, Singinn Lawson).) Of these, Eric Jones was also a former employee that Delta Western elected not to interview (or rehire). (Tr. 182:7-183:1; Resp. Exh. 70.) The Employer was not aware of whether Jones supported the union or not. (Tr. 182:7-183:1.) It certainly did not factor into the decision. (*Id.*) Moreover, the GC presented no evidence to suggest or infer that Jones was affiliated with, or supported the union, at any time during his employ. (*Cf.* GC Exh. 3 *with* 4 *and* 5.)

29. **Dario LaFranks / Richard Custodio**. Delta Western ultimately did offer employment to two individuals for the Driver Dock Attendant position — Dario LaFranks and Richard Custodio. (Resp. Exhs. 52, 77.) Both individuals were members of the International Longshoreman Workers' Union ("ILWU"). The IBU is affiliated with the ILWU. (Tr. 210:13-23, 211:3-11.) Union affiliation or support simply played no part in the decision to hire them. (*Id.*) They do, however, provide comparator evidence that union affiliation and support was not a factor in Delta Western's hiring decisions.

30. **Dacio's April 2017 Discipline for Failure to Report.** Another piece of information that Delta Western did not harbor animus to Dacio's Section 7 rights to support a union is the written warning he received in April 2017. (Resp. Exh. 1.) In April 2017, a vehicle was overturned and almost hit the pipeline. (Tr. 152:4-9.) Dacio failed to report this incident. *(Id.)* Dacio was not terminated for this event, even though Dacio acknowledged it was a terminable offense, and another employee had previously been terminated for failing to report. (Tr. 85:18-25, 196:6-12, 197:4-6.) This written warning occurred after Dacio's prior union activity.

VI. ANALYSIS

A. BASIS FOR DELTA WESTERN'S DECISION WAS LAWFUL.

Dacio was lawfully terminated for failing a random drug test by testing positive for methamphetamines and amphetamines. The GC does not contest this fact. (Tr. 22:16-20) ("Respondent terminated [Dacio's] employment as a result [of a failed random drug test]. That is not at issue in this case.").

Here, the GC erroneously alleges that the Respondent's decision to not rehire Dacio was based upon his prior union affiliation and support. There is no support for this allegation. There is simply no evidence of discrimination by the Respondent – direct, circumstantial or otherwise.

The Act does not circumscribe an employer's right to discharge (or not rehire) an employee for reasons that are not forbidden by the Act. "The employer can [refuse to hire] at will, so long as his action is not based on union membership or intent to interfere with purposes of the Act." *Mission Clay Prods.,* 206 NLRB 280, 281 (1973). "[I]f the [adverse employment decision] is actually motivated by a lawful reason, the fact that the employee is engaged in Union activities at the time will not tie the employer's hands and prevent him from the exercise of his business judgment to [not rehire] an employee… It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer's policies, including his policies over tenure of employment, and that an employer may [take any business action] for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act." *NLRB v. Ace Comb Co.*, 342 F.2d 841, 847 (1965).

In the instant matter, the Respondent initially wanted to rehire Dacio, even after he failed the drug test. (Tr. 68:4, 22-24; 73:11-14.) Respondent even instructed Dacio that he should reapply once a position becomes open. Only after Hunter and Myers reviewed Dacio's employment application, did they fully understand that Dacio had failed to accept responsibility and take accountability for his actions. (Tr. 173:6-20, 205:14-206:10.) On that application, Dacio claimed that he was "unjustly terminated" after he was the individual that failed the drug test. (Resp. Exh. 11.) He also claimed that he was "suddenly terminated."[7] Both statements were inaccurate and showed a lack of accountability. Both Myers and Hunter decided that they could no longer trust Dacio to transport petroleum to their customers and the residents of the community-at-large.

[7] As evidenced in the Fact Section above, the MRO – by law – was required to notify Dacio before the MRO would have submitted the positive test results to the Employer. 46 CFR § 40.131. Dacio was not "suddenly terminated" as he claimed.

This decision that the Company could not trust Dacio was verified at the hearing. During the hearing, Dacio admitted that he had tested positive for methamphetamines and amphetamines.[8] He claimed that the positive test result was based on a Philipino doctor's prescription in 2014 for amphetamines for a heart condition. (Tr. 72:5-7.) Dacio later admitted that the drugs were actually prescribed to help him stay awake. (Tr. 94:3-9; GC Exh. 9.) He also admitted that he had used the drugs while at work on a number of occasions. (GC Exh. 9.) The simple fact that Dacio was not caught until 2017 was pure luck on Dacio's part, and even luckier that he did not kill himself or others while he was delivering fuel throughout the community on methamphetamines. The decision not to rehire Dacio based upon his failed drug test and his failure to accept responsibility does not violate the Act. As a result, it is solely within Delta Western's business judgment to make that decision.

The Board has long instructed judges not to substitute their own business judgment for that of the employer. *Lama Advertising of Hartford,* 343 NLRB 261 (2004); *Yellow Ambulance Service*, 342 NLRB 804 (2004). "The Board, moreover, has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and in fact was the cause of the action taken." *Framan Mechanical, Inc.*, 343 NLRB 408 (2004).

Here, whether good or bad, there is no evidence to even suggest that the proffered reasons by Myers and Hunter on why they did not rehire Dacio, were not honestly given. The decision not to hire an individual that tested positive for "meth" and refused to accept accountability for his mistakes in a position to deliver fuel to the community is a valid, lawful business decision. Thus, their business judgment must stand since it does not violate the Act. Respondent will address the

[8] Dacio – despite admitting he tested positive for methamphetamines – only informed Kelly Wright during his assessment of the positive result for amphetamines. (*Compare* GC Exh. 9 ("He reported that he had been prescribed an amphetamine…") *with* Tr. 71:23-24 ("A: Yeah, because one of the medications that I was taking was positive for methamphetamine.").)

legal issues expected to be raised by the GC. In the end, however, this case is simple. Dacio was not rehired based solely upon his own actions and failure to accept responsibility for those actions. He was the person that failed the drug test. He was also the person that claimed he had been suddenly and unjustly terminated, even after the facts – as Dacio testified to – showed that he had consistently violated the company's drug and alcohol policy since 2014. Respondent made the business judgment that it could not afford to trust Dacio based upon his behavior. This decision simply does not violate the Act.

B. STANDARD UNDER WRIGHT LINE

"The Act imposes upon each employer the duty to consider each request for employment in a lawful, nondiscriminatory manner." *Ultrasystems Western Constructors*, 310 NLRB 545, 554 (1993). Discrimination in refusing to consider an applicant for hire (or rehire) based upon union affiliation or support violates the Act. *3E Company, Inc.,* 322 NLRB 1058, 1061-62 (1997). The GC must prove:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination: and (3) that antiunion animus contributed to the decision not to hire the applicants.

FES and Plumbers, 331 NLRB 9, 12 (2000) *enf'd* 301 F.3d 83 (3rd Cir. 2002).[9]

[9] As will be discussed in Section C herein, the General Counsel has failed to establish that animus or discriminatory motive contributed to the Employer's decision.

Initially, the GC's Complaint, and the amendments thereto, allege that the Respondent's refusal to rehire Dacio occurred on or about January 26, 2018.[10] (GC Exh. 1(G).) This was the day after Dacio completed his SAP Return-to-Work program. (Resp. Exh. 38.) There was no open position on that date. (Tr. 164:10-15, 167:9-25; Resp. Exhs. 41, 42.) As a matter of law, the GC cannot establish a refusal to hire under § 8(a)(3), unless there is an open position. *Id.* Dacio even admitted that he could only apply for a position when a requisition had been created online, and that his first available opportunity to apply for a position was on March 13, 2018. (Tr. 81:13-14, 132:4-19, 168:19-20; Resp. Exh. 13.) There was no open position from the time that Dacio was eligible to work again in a DOT-position (January 26, 2018) until the March 13, 2018 Driver Dock Attendant position was opened.[11]

Next, the General Counsel has failed to establish the requisite animus or causal connection. The Board has "always required the General Counsel to persuade that antiunion sentiment was a substantial factor in the challenged employer decision." *Manno Electric*, 321 NLRB 278, 280-81 (1996). The fact that a non-union employer fails to hire a union member does not establish a case of anti-union sentiment. *Shell Electric,* 325 NLRB 156 (1988). "There must be some proof of animus and causal connection." *Oil Capitol Sheet Metal,* 349 NLRB 1348, 1367-68 (2007).

As with all cases of discriminatory intent under § 8(a)(3), the Board utilizes the *Wright Line* test to establish employer motivation. *3E Company,* 322 NLRB at 1062; *Wright Line*, 251

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[10] The Complaint also includes an allegation that Delta Western did not consider to hire Dacio. There was no evidence presented at the hearing to support this allegation. Dacio was considered for rehire by Hunter and Myers. (Tr. 175:11-14, 186:5-11, 208:21-209:11.) He was ultimately not selected for an interview (or to be rehired) after they reviewed his employment application. (*Id.*) Even Dacio acknowledged that Hunter and Myers told him he should apply when a position became open, and Hunter had told him to "try and fix [his positive drug test] as soon as possible" so he could get back to work. (Tr. 68:22, 77:6-21, 78:3-7.)

[11] To the extent the GC will attempt to argue that the Employer discriminatorily-required Dacio to fill out an employment application that was required by Company policy, DOT regulations, and all other applicants were required to fill out, such an argument is mistaken, and addressed more fully in Section C.2.b. herein.

NLRB 1083 (1980), *enf'd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982). The General Counsel must initially establish a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision.[12] *Am. Gardens Mgmt.*, 338 NLRB 644 (2002). First, the GC must show that the employee's activity is protected by the Act. *Id.* Second, GC must prove that the Respondent was aware that the employee engaged in said activity. *Id.* Third, the GC must show that the alleged discriminatee suffered an adverse employment action. Fourth, the GC must establish a causal or motivational link between the employee's protected activity and the adverse employment action. *Id.* After the GC has established a *prima facie* case, the Respondent may rebut this presumption by showing that the same action would have taken place even in the absence of the protected conduct. *Id.*

C. GENERAL COUNSEL HAS FAILED TO MEET HIS PRIMA FACIE BURDEN OF ANIMUS AND CAUSAL CONNECTION

There is no evidence of direct discrimination in this matter. Instead, the GC relies upon circumstantial evidence. Respondent does not dispute that – in the right case – circumstantial evidence may be derived from evidence of suspicious timing, false reasons given in defense of the action, departures from past practices, and disparate treatment. *The 3E Co.,* 332 NLRB at 1653.

In addition to showing that the employee in question suffered an adverse employment action, there must be some link or nexus between the employee's protected activity and the adverse employment action. *Tracker Marine, LLC*, 337 NLRB 644, 646 (2002). This nexus must also

[12] The Board has utilized the motivating or substantial factor test. *See Manno Electric, supra.* Section 8(a)(3) of the Act provides that "[i]t shall be an unfair labor practice for an employer – (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization…" Respondent submits that the proper standard is the "but-for" causation standard described in *Gross v. FBL Financial Serv., Inc.*, 557 U.S. 167, 178-180 (2009). Respondent understands this is contrary to current Board precedent. In this case there is no motivation that GC can show so it is not material.

"rest on something more than speculation and conjecture." *Amcast Auto. of Ind., Inc.*, 348 NLRB 836, 839 (2006). The General Counsel's case in this matter is based entirely on meritless speculation, and held together with baseless conjecture. Upon review, there is no substance to the General Counsel's suggested inferences and allegations.

1. The times of Dacio's Union activity is not sufficiently close in time to merit an inference of discriminatory motive.

The General Counsel attempts to rely upon the temporal proximity of Dacio's union activities to claim an inference of discriminatory intent. The temporal proximity between the events, however, is far too remote to support such an inference. The refusal to rehire Dacio occurred in March 2018. The General Counsel asks the Judge to infer a discriminatory motive of that March 2018 decision based upon Dacio's prior Union affiliation or support that occurred from February 2014 through July 2016.[13] (GC Exh. 3-8.)

The use of temporal proximity to establish a causal nexus between the alleged protected activity and the adverse employment action requires a 'very close' proximity. *Clark Cnty Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (analyzing the use of temporal proximity to establish discrimination under Title VII and citing cases that a 3-month period was insufficient). The NLRB has followed the U.S. Supreme Court's analysis related to the Act finding that the timing must be very close if the GC is going to rely solely upon timing to establish a causal connection. *Lucky* Stores, 275 NLRB 1438, 1439 (1985) ("[N]o basis for imputing unlawful retaliatory motivation upon Respondent's actions some 3 months later."); *Rockland Bamberg Print Works*, 231 NLRB 305, 306 (1977) *enf'd mem.* 566 F.2d 1173 (4th Cir. 1977) (finding that discharge 5 months after a union organizing campaign was too remote); *Geo V. Hamilton, Inc.*, 289 NLRB 1335, 1340-41

[13] There is no evidence that Dacio was affiliated with or supported the Union after it was decertified on July 18, 2016. (Tr. 65:10-19, 151:1-7.)

(1998) (finding that layoff 11 months after participation on union negotiation team was "too remote in time to be linked"); *Irvine Tanning Co.*, 273 NLRB 6, 8 (1998) (finding that termination of known union supporter 5 months after an unsuccessful union organizing drive was insufficient evidence of an unlawful motive); *Thomas Brown* Shoes, 257 NLRB 264, 268 (1981) (holding that there was an insufficient showing of discriminatory motivation where protected conduct occurred almost 6 months prior to the disciplinary action); *New York Hosp. Med. Ctr. of Queens*, 2015 NLRB Lexis 959, *83-84 (December 31, 2015) (ruling that a 4-month gap between employee's protected activity and the alleged discrimination was too remote to support an inference of discriminatory intent); (*Amcast Auto Ind.*, 348 NLRB 836, 839 (2006) (finding that the gap between an employee's pro-union activity in 2002 and his subsequent discharge in 2006 was "too great to support such a connection"). Board cases that rely upon temporal proximity to establish discrimination under § 8(a)(3) of the Act must be very close in proximity. The reasoning intuitively makes sense. A discharge that occurs one week after union activity may suggest a discriminatory motive, whereas an adverse action occurring almost 21 months after the union activity does not, without more, suggest the same motive.

In *Qualitex, Inc.*, 237 NLRB 1341 (1978), the employer was involved in a union organizing campaign. The employer opposed the union's organizational efforts. *Id.*, at 1343. The employer had a series of meetings with employees in the plant, sent letters to employees at their homes, and generally expressed their opposition to the union. *Id.* Although there was evidence that the employer "vigorously opposed the unionization of employees", there was no evidence that the employer had violated the Act in its opposition. *Id.* The union lost the election in December. *Id*, at 1343. Four months after the election an employee that actively supported the organizing

campaign was discharged. *Id.,* at 1344. The Board found that the timing and employer's action was insufficient evidence to establish discriminatory intent.

Here, the General Counsel relies upon far less. The Union activity occurred – at most – nearly 21 months prior to Dacio's refusal to rehire claim. Under Board law, this temporal proximity is simply too remote to establish a causal connection. Thus, the General Counsel may not rely upon the timing alone to establish his *prima facie* case.

2. The Comparators do not establish a discriminatory motive on behalf of the Employer.

It is anticipated that the General Counsel will also attempt to infer a discriminatory motive by using comparators. First, it is anticipated that the General Counsel will argue that since the Respondent had previously rehired individuals that failed a drug test, it was obligated to rehire Dacio. Next, the General Counsel may claim that the mere obligation of having Dacio fill out an employment application was discriminatory since there is no evidence that Marquez filled out an employment application. Finally, the GC may attempt to use prior charges that formed the basis of a 2015 non-admission Board settlement as evidence of animus.

Comparator or disparate treatment evidence is usually used after the GC has established its *prima facie* case and used to rebut an employer's affirmative *Wright Line* defense that it would have taken the same action regardless of union activity. *See New Otani Hotel & Garden,* 325 NLRB 928, 941 (1998) describing the use of comparator or disparate treatment evidence. When disparate treatment is used – as it is here – to attempt to establish the General Counsel's *prima facie* burden of employer motivation, the disparate treatment must show "blatant disparity [sufficient] to support a *prima facie* case of discrimination." *Id.*, at 928 n. 2 (quoting *Fluor Daniel, Inc.,* 304 NLRB 970, 970-71 (1991).).

In the instant matter, the GC has not shown disparate treatment. Moreover, the GC has certainly not shown the necessary "blatant disparity" required to establish a *prima facie* case of discrimination.

a. *Prior rehires that had failed a drug test does not establish a discriminatory motive by Delta Western for refusing to rehire Dacio.*

It is accurate to state that evidence of proper comparators being treated disparately may infer discriminatory intent; it is not, however, accurate to claim that Leo Dacio and Robin Marquez (or Tracy Bulard) are appropriate comparators to establish discriminatory intent.

First, Marquez (or Bulard) are not proper comparators with Dacio. Neither Marquez, nor Bulard, claimed that they had been unjustly terminated after they were fired for failing a drug test. (Tr. 207:7-21, 208:10-20; Resp. Exhs. 17, 18.) This type of comparison was referred to as an apple-to-oranges comparison in *New Otani Hotel*. 325 NLRB at 942. A proper comparison is one that involves a "plain failure by the employer or its supervisory or management agents to treat equally-situated employees equally." *Id.* Here, neither Marquez, nor Bulard, claimed upon the rehire process that they had been "unjustly terminated" after they had failed a drug test. They are, therefore, not equally-situated to Dacio. The situations between Dacio and Marquez (or Bulard) are simply not analogous to one another.[14]

Next, simply because there is a difference in treatment, does not mean the GC has established a *prima facie* case of discrimination against Dacio. Disparate treatment (or comparator evidence) is only useful to the extent that one may infer discrimination from the disparity. This

[14] It is important to consider what the GC implies with this argument. Is the GC really stating that an employer would be required to <u>always</u> rehire <u>all</u> applicants who had failed a drug test regardless of any other factors involved, so long as there is evidence of some union support? Such a claim is not supported by law or logic.

inference is why the Board requires that the disparity be blatant. *New Otani Hotel*, 325 NLRB at 928 n. 2.

> [A]bsent independent proof of the employer's antiunion animus, even evidence of actual, conscious disparity of treatment by an employer or its agents when it comes to rule-enforcement is generally not a reasonable basis for inferring that the employer's enforcement of a rule in a given instance against an employee who has engaged in union activities known to the employer was *motivated* in any way by the employee's union activities. There are simply too many explanations for such phenomena that do not raise concerns under the Act.

Id.

Here, Marquez[15] and Bulard were rehired after a failed drug test. This fact does not establish that the General Counsel has met its *prima facie* case related to Dacio. What is more telling is that the Employer wanted Dacio to reapply once he had completed the SAP process, and encouraged him to do so. The Employer only changed its opinion after it reviewed Dacio's employment application. Dacio's case is not comparable to the prior individuals that failed drug tests at Delta Western.

b. *Requiring Dacio to fill out an employment application does not establish a discriminatory motive.*

The General Counsel may attempt to claim that the potential failure to require an employment application from Robin Marquez may infer discriminatory intent.[16] Per DOT

[15] It is unclear why the GC emphasized the fact that the Employer aided Marquez in his SAP process. (GC Exh. 10.) Marquez was required to go through the cost and expense of two separate SAP programs through no fault of his own, because the initial Dutch Harbor Clinic was not certified. (Tr. 118:1-8.) He then did not have the necessary money to attend the SAP classes in Anchorage. (Tr. 118:10-17.) The Employer advanced Marquez the cost of an airline ticket that Marquez paid back. (Tr. 118:24-119:3.) The Employer would have helped Dacio as well had he asked for financial assistance. (Tr. 208:4-9.)

[16] Marquez was terminated for failing a drug test on June 5, 2013. (Resp. Exh. 17.) The statement on the form, "Pending completed Return-to-Work Program" referenced Marquez' eligibility to be rehired, so long as he completed the DOT-required SAP Return-to-Work program. (Tr. 207:1-9.) Marquez was rehired because he accepted ownership and responsibility for the failed test. (Tr. 207:12-18.) As evidenced by Tracy Bulard, Delta Western required employees that were being rehired to submit an employment application and apply to an open position. (Resp. Exh. 18.)

regulations, Delta Western has a policy requiring all applicants (including rehires) to submit an employment application. 49 CFR 391.21. This has been done since 2001. In preparation for this hearing, it was learned that the company could not find an employment application for Robin Marquez. (Tr. 135:16-25.) This violated the Respondent's hiring procedures and DOT requirements. (Tr. 136:4-8.) This occurred when an interim-human resources individual was filling-in for Myers when she was away from Delta Western. (Tr. 136:9-18). To Myers knowledge, all other hires and rehires have been required to submit employment applications. (Tr. 136:9-13.)

To the extent that the GC will claim that Dacio was subject to additional requirements that others were not (e.g. an employment application), such a claim is erroneous. All applicants for the Driver Dock Attendant position were required to submit a complete application before they were considered for hire. (Resp. Exh. 42.) This practice has been Delta Western's standard practice since 2001. All applicants (including rehires) are required to submit a complete employment application to be considered for hire. Further, all applicants for 2018 Driver Dock Attendant positions were required to complete an employment application before they were considered for employment. (Resp. Exh. 43 – 77.) Along with Dacio, Eric Jones was a former employee. There was no evidence that Jones supported the Union. The Respondent required Eric Jones, along with everyone else, to complete an application. Even though Jones completed an application and was a former employee, he was not interviewed or offered the position. (Resp. Exhs. 18, 20–36 (examples of the rehire applications received by Delta Western.) A single, inadvertent error by an interim manager, six years previously, simply is not evidence of animus or discriminatory intent of any sort.

c. *General Counsel may not use Mo Reyes' termination as evidence of Union animus on the part of Delta Western.*

There was a fair amount of testimony regarding a former employee, Mo Reyes, at the hearing. To the extent the GC intends to argue that both Dacio and Reyes supported the Union, so Reyes' discharge is somehow evidence of animus, such a conclusion is meritless. Reyes was terminated for a severe safety violation. (Tr. 133:12-15.) He was seen vacuuming out a fuel tank with a shop-vac. (*Id.,* Tr. 99:4-12.) When he was seen doing this, the mechanic who witnessed the act put in an immediate stop-work order. (*Id.*) This was a problem because of the static electricity created by using a shop-vac in a fuel tank. (Tr. 133:17-18.) Issues with static electricity in the fuel tanks are taken extremely seriously because, as Dacio put it, the place can go "KABOOM." (Tr. 83:14-23.) Further, Reyes' termination was covered within the Respondent's motion in limine to exclude all testimony, argument or evidence related to prior 2015 settlement agreement. This settlement agreement contained a non-admissions clause, and may not be used to establish union animus. *Steve Sash & Door Co.*, 164 NLRB 468, 476 (1967).

3. General animus during the organizing campaign is not sufficient to establish the necessary causal nexus to Dacio's refusal to rehire.

The GC does not, nor could he, provide any evidence of discriminatory intent (or anti-union animus) connected with the refusal to rehire Dacio. Instead, the GC attempts to rely upon general animus based upon the union election campaigns from February 2014 – July 2016. This is also insufficient. Under *Wright Line*, the GC must show that Respondent exhibited specific animus toward the employees' Section 7 rights, not simply a general anti-union animus. *Basic Industries, Inc.,* 348 NLRB 1267, 1267-68 (2006).

In *Basic Industries*, the Board dismissed the complaint, finding that the General Counsel had failed to establish the necessary animus as part of his *prima facie* case. *Id.* Two individuals

helped organize the union and were union strikers. 348 NLRB at 1267. During the organizing campaign, the Employer opposed the union, holding a lawful captive audience meeting. *Id.*, at 1267-68. The employees had also engaged in a self-styled unfair labor practice strike. *Id.* Twelve months after the employees had participated in union organizing, they were laid off. *Id.*, at 1267. The Board determined that the General Counsel's reliance on general animus and lack of temporal proximity was insufficient to establish the necessary animus under the *Wright Line* test.

a. *The Employer's constitutionally-protected speech during an election campaign is not evidence of a discriminatory motive.*

The GC presented a February 2014 letter from Kirk Payne and Brian Bogen that was sent to employees whereby the Employer expressed its position regarding the union organizing campaign. (GC Exh. 2.) The GC also asked Tim Hunter and Liane Myers the Employer's position as to the union organizational campaign in 2014 and 2016. Hunter explained the Employer's position as follows: "The Employer felt that the employees were better represented through the Employer and not the union." (Tr. 214:10-11.) This statement and position is protected by the 1st Amendment of the U.S. Constitution and § 8(c) of the Act. Presumably, the GC will attempt to assert that these protected statements somehow show an illegal union animus sufficient to support a charge of discrimination. This assertion, if it is made, does not support such an inference.

The Board in *Qualitex, Inc.*, 237 NLRB 1341, and in *Basic Industries*, 348 NLRB 1267, discussed above, dealt with similar issues and determined that the lawful actions during a union organizing campaign did not amount to evidence of discriminatory intent or anti-union animus. Although these Boards did not completely detail their rationale, it is the correct viewpoint. Section 8(c) of the Act provides:

> Expression of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not

> constitute evidence of an unfair labor practice…[unless it] contains [a] threat of reprisal or force or promise of benefit.

Section 8(c) was created with the passage of the Taft-Hartley Act, guaranteeing employers and unions the "full exercise of the right of free speech." H.R. Rep. No. 245, 80th Cong., 1st Sess., at 6 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 297 (1948) (hereinafter "Legislative History"). Consequently, speech protected by that section cannot be used by the General Counsel to establish an employer's anti-union animus. *See also, Medeco Security Locks v. NLRB,* 142 F.3d 733, 744 (4th Cir. 1998 (citing *Alpo Petfoods v. NLRB*, 126 F.3d 246, 252 (4th Cir. 1997)); *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1347 (2nd Cir. 1990) (noting that 8(c) was intended "to prevent chilling lawful employer speech by preventing the Board from using anti-union statements, not independently prohibited by the Act, as evidence of unlawful motivation.").

Furthermore, even to the extent such lawful statements could – at one time – be used as evidence, any such claim has now gone stale. If the General Counsel intends to rely upon statements made during an organizing campaign to support a charge of discrimination, those statements must be reasonably close in temporal proximity. *New Otani Hotel*, 325 NLRB at 939 (declining to rely upon expressions of antiunion animus 8 months before discharge in part because they were too temporally remote); *Magic Pan, Inc.*, 242 NLRB 840, 853 (1979) (finding employer's alleged antiunion statements made 6 months before discharge too remote to support finding of animus); *Permaneer Corp.*, 214 NLRB 367, 369 n. 8 (1974) (statements of union animus made 1 year before discharge were "too remote to constitute probative evidence of union animus at the time of [ ] discharge."). The legal statements and actions of the Employer in 2014 – 2016 do not create an inference that the Employer had animus against the Union or Dacio in March 2018. Otherwise, the General Counsel would have one believe that it can rely upon any organizing

campaign to later prove discriminatory intent no matter how far in the past those alleged statements were made.

b. *The Employer's lawful enforcement of its property rights during a strike is not evidence of a discriminatory motive.*

Similarly, it is anticipated the GC will argue that the Employer's lawful enforcement of its property rights during two one-day strikes in 2014 permit an inference of discriminatory intent. In the instant matter, there was testimony regarding two one-day strikes in 2014. (Tr. 54:11-22; GC Exh. 3.) The Dutch Harbor facility is a secured facility. (Tr. 152:4-7.) The employees engaged in two, partial-day strikes that lasted a few hours each. The picket lines were initially located inside the secured area in front of the fuel dock. (Tr. 44:18-19.) During that time, the police were called and the striking employees were moved to the public area and informed that they could not trespass. (Tr. 45:21-46:19.) This entire sequence was legal. An employer may enforce its property rights during a strike action. *The Colonial Press, Inc.,* 204 NLRB 852, 857 (1973); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

The General Counsel asks that you infer an illegal discriminatory motive related to the Employer's lawful publication and dissemination of a written statement during a union organizing campaign and its lawful enforcement of its property rights. To do so, one would need to accept that the Employer's lawful actions in 2014 and 2016 evinced evidence of the Employer's intention to discriminate against Dacio in March 2018. Such an argument breaches the bounds of a reasonable inference.

c. *Delta Western's actions as a whole show that it was not acting with a discriminatory motive.*

A reasonable inference should take all facts and circumstances into account. In evaluating whether conduct prior to July 2016 constituted animus to discriminate against Dacio in 2018, it is

important to note the events that occurred after the IBU was decertified as the bargaining representative.

First, in April 2017, Dacio committed a serious act of misconduct when he failed to report an overturned vehicle that nearly hit the Delta Western fuel pipeline. (Tr. 152:4-9.) All agree that a failure to report is a terminable offense. (Tr. 85:18-25, 196:6-12, 197:4-6.) Rather than terminate Dacio, as Delta Western had done in the past with another employee, Dacio was provided a written warning. Had Delta Western truly had the requisite animus to discriminate against Dacio terminating his employment in April 2017 would have presented an ideal opportunity. Not doing so, is evidence that Delta Western harbored no animus toward Dacio's engagement in his Section 7 rights, and therefore, no animus.

Next, when Dacio was terminated for failing the drug test, Delta Western promoted Robin Marquez. (Resp. Exh. 39.) Marquez was engaged in the same union activities as Dacio. (GC Exhs. 3, 4, and 5.) It defies logic and reason that Delta Western would discriminate against Dacio for his union activities, and then immediately promote Marquez who was engaged in the same activities.

D. DELTA WESTERN HAS ALSO ESTABLISHED ITS AFFIRMATIVE DEFENSE UNDER *WRIGHT LINE,* EVEN IF THE GENERAL COUNSEL MEETS ITS *PRIMA FACIE* BURDEN.

Under *Wright Line*, once the General Counsel has met its burden, the Employer is still not liable under the Act, if it can prove that it would have taken the same action even if the employee had not engaged in protected activity. *FES and Plumbers*, 331 NLRB 9 (2000). The Employer found its basis for not rehiring Dacio in Section A of the Analysis section herein. The Employer's decision not to rehire was not based upon Dacio's union activities. Dacio failed a drug test and then claimed upon his employment application that he was unjustly terminated. The Employer

would have taken the same action regardless of Dacio's union activity. In fact, the Employer actually hired two individuals – LaFranks and Custodio – for the March Driver Dock Attendant positions that were affiliated with the union. Further, the Employer promoted Marquez to Dacio's former position, even though Marquez engaged in the same union activities. The GC has presented no evidence to rebut the Employer's defense under *Wright Line* that it would have taken the same action against Dacio, regardless of union activities.

V. CONCLUSION

The General Counsel's case is a house of cards. He is relying upon legally permissible actions by the Employer from February 2014 – July 2016 to bootstrap an inference of a discriminatory motive in March 2018. Neither the timing of the actions, nor the actions themselves, warrant such an inference. In fact, taken as a whole, the only reasonable inference one could make is that the Employer did not harbor any discriminatory motive toward Dacio. Thus, the General Counsel has failed to establish the animus and causal nexus required for his *prima facie* case.

Furthermore, even to the extent one presumes the General Counsel has established his *prima facie* case, the Employer has readily established its *Wright Line* affirmative defense. Dacio failed a drug test, testing positive for methamphetamine and amphetamine. He was asked by the Employer to apply when a position became open, provided he completed the required SAP program. When he applied, he inaccurately claimed he had been "unjustly terminated," and the termination occurred "suddenly." Upon examining his employment application, both Myers and Hunter determined that Dacio had not accepted responsibility or accountability for his actions. As a result, he was not offered to be rehired. This employment action would have been made

regardless of Dacio's union affiliation or support. There is simply no evidence that Delta Western's actions violated the Act.

For all of the aforementioned reasons, the Complaint should be dismissed.

Dated: MARCH 29, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2019, I electronically filed the foregoing ***RESPONDENT'S POST-HEARING BRIEF*** with the National Labor Relations Board using the NLRB E-Filing system.

I further certify that I caused to be served a true and correct copy of the foregoing document upon the following individuals via U.S. Mail as follows:

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